



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 58 OF 2016

ALLIANCE MEDIA KENYA LIMITED.....PLAINTIFF

VERSUS

THE KENYATTA INTERNATIONAL CONVENTION CENTRE.....DEFENDANT

RULING

The dispute herein relates to a licence granted by the defendant to the plaintiff, whereby the plaintiff was to place an advertising signage around the neck of the helipad view point of a popular building in the city of Nairobi, known as Kenyatta International Convention Centre.

According to the plaint the licence was intended to commence on 1st February 2013 to run for a period of 3 years with a provision that it could be renewed for a further 3 years. However, the commencement date was not achieved due to logistical challenges connected to consents and approvals by the relevant national and county authorities.

By a letter dated 26th August, 2013 the defendant informed the plaintiff that the relevant Ministry had approved the project and permitted the plaintiff to carry out installation works subject to conditions set out therein. I shall revisit the said communication later on in this ruling.

It is the plaintiff's case that the commencement date was shifted from 1st February, 2013 to 1st October, 2013, and the new expiry date was therefore 30th September, 2016 with the option to renew the licence for 3 years. Thereafter the plaintiff mounted the structure and commenced testing of the signage. However, the defendant switched off the power and pulled down the entire system which caused damages to the structure.

Aggrieved by the defendant's action, the plaintiff filed ELC case No. 1384 of 2013 which was however settled by consent of both parties on 2nd December, 2013. By that consent the plaintiff was allowed access to the site and reinstall its advertising signage which was done and power restored.

Going by the date of the said consent, it is the plaintiff's case that the licence period therefore commenced on 2nd December, 2013 to run for 3 years. It is also the plaintiff's case that the reinstallation attracted extra costs, and it was agreed between the parties the damage caused on the structure and the extra costs, would be offset against future rentals after the expiry of the first period of 3 years which is to come to an end on 2nd December, 2016.

The total costs according to the plaintiff in repairing and re- installing the signage amounted to Kshs.

9,371,017/=. The rent payable per quarter is said to be Kshs. 1,350,000/= which according to the plaintiff means the lease should be extended for a period of 21 months from the date of its expiry. The foregoing notwithstanding, on 11th August, 2015 the defendant wrote to the plaintiff indicating the licence was to come to an end on 31st January, 2016.

There is evidence of some correspondence between the parties with the plaintiff assenting its position as set out above, but on 2nd February, 2016 the defendant wrote to the plaintiff stating that the licence had expired and that the plaintiff was to remove its signage and restore the site to its original condition, failure of which the defendant would do so without further reference to the plaintiff. In the meantime the defendant proceeded to switch off power to the signage.

The plaintiff pleads that the licence period commenced on 2nd December, 2013 and has paid rent for the first quarter of the year 2016. It is also its case that it has complied with the terms of the lease. Based on contents of the agreement, it is the plaintiff's case that it had legitimate expectations that the license will be renewed and based on that expectation, it engaged its clients with whom they have a contract that runs to the year 2018.

Accordingly, if the defendant is not restrained from breaching the licence and interfering with the use of the leased premises for advertising purposes, the benefits secured under the contract licence will be rendered useless of the commercial value. The plaintiff therefore prays for judgment against the defendant for specific performance of the licence contract which has been duly varied between the parties, and an injunction to restrain the defendant whether by itself, servants, agents, employees or otherwise from removing the LED advertising signage from the premises aforesaid, and from preventing reasonable access for maintenance, erection or replacement of advertisement or preventing the use of the site by switching off electricity.

There is also a prayer by way of declaration that subject to the consent order dated 2nd December, 2013, the licence period commenced on 2nd December, 2013 and expires on 2nd December, 2016. There is also a prayer for a mandatory injunction compelling the defendant to offset the cost incurred by the plaintiff in repairing and reinstalling the advertising signage with rental rates after the expiry of the lease.

Alongside the plaint there was filed an application by way of Notice of Motion for injunction orders set out in the prayers aforesaid. The application is supported by grounds set out on the face thereof, alongside an affidavit sworn by one John Wambua Muswa the Business Development Manager of the plaintiff's company. The application is opposed and a replying affidavit has been sworn by Maureen Chogo – Chahale the Legal and Regulatory Affairs Manager of the defendant.

This was followed by a supplementary affidavit sworn by John Wambua Muswa aforesaid. I observe at this stage that although there is an affidavit of service upon the defendant filed on 26th February, 2016 indicating that the defendant has been served with the plaint and all accompanying documents, no defence has been filed to date. I can however decipher from the replying affidavit what the defence is likely to be in this matter.

The defendant has extensively referred to the contract executed between the parties relating to the said licence. It is the defendant's position that the plaintiff cannot claim any right to the said licence that is alleged to have been breached by the defendant because in the first place the plaintiff did not comply with approvals given by the Nairobi City Council.

Reference to the consent order made on 2nd December, 2013 in ELC Case No. 1384 of 2013 has been disputed, because that consent order did not alter the provisions of the contract. This is because the said consent order was in settlement of the plaintiff's application for injunction in that suit, but did not capture the commencement date or any variations of the licence. Further, it required the plaintiff to resume its works subject to obtaining all the necessary consents and approvals.

The defendant has then referred to several letters addressed to the plaintiff and reiterates that the licence

term has expired the expiry date having been 31st January, 2016. It is also the defendant's case that the plaintiff is and has been aware that there was no agreement to renew the contract as demonstrated by the correspondence exchanged.

It is also the defendants position that the plaintiff has not established a prima facie case with a probability of success, and that it will not suffer irreparable damage that will not be compensated by an award of damages. In any case, the balance of convenience tilts in favour of the defendant because public interests overrides private interests in this case.

Both counsel have filed written submissions in this matter and cited several authorities. These I have read and in the event I do not cite any particular case, this should not be construed to be wanting in substance. Both parties have referred to the case **Giella Vs. Cassman Brown and Co Limited (1973) EA 358**, In that case and many others that followed, it was held that the principles guiding the grant of interlocutory injunction are well settled. A party needs to show that they have a prima facie case with a probability of success; that they stand to suffer irreparable damage that cannot be compensated by an award in damages, and that in the event of any doubt in regard to the above two conditions, that the balance of convenience having regard to the circumstances of the matter tilts in favour of the applicant.

The courts have defined what a prima facie case is and this includes but not limited to a genuine and arguable case. It is a case which on material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter- see **Mrao Vs. First American Bank of Kenya and Two Others (2003) KLR 125**.

The plaintiff has pleaded that damages will not be sufficient to compensate the loss that may follow if the orders sought are not granted. It is indeed established if damages would be adequate remedy and the defendant would be in a financial position to pay, no interlocutory injunction should normally be granted however strong the plaintiffs claim appears to be at that stage – See **Alternative Media Limited Vs Safaricom Limited (2004) eKLR**.

Where the court is in doubt however as the authorities point out, the court shall make an order based on a balance of convenience. The suit before this court was initiated in the ELC Division as case No.149 of 2016. It was then transferred to the Civil Division and given **No. HCCC 58 of 2016**. The parties and the pleadings are exactly the same.

In the earlier suit between the same parties (ELC NO.1384 of 2013) on 2nd December, 2013 a consent order was recorded before Hon. A.N Ongeru as follows,

“ BY CONSENT

1. THAT the Defendant/Respondent do allow the Plaintiff/Applicant access, ingress and egress to enable the plaintiff/applicant to return, re-install and restore all its LED advertising signage situated at the neck of the tower block of The Kenyatta International Convention Centre, erected on Land Reference Number 209/19829 Nairobi, to its previous working state and conditions of functionality subject to the plaintiff/applicant obtaining all the necessary consents/approvals

2. THAT upon satisfaction of Paragraph One (1) above the Defendant/Respondent do allow the Plaintiff/Applicant all the necessary access, ingress and egress to its LED advertising signage situated at the neck of the tower block of The Kenyatta International Convention Centre, erected on Land Reference Number 209/19829 Nairobi, for the purpose of facilitating and enabling its continued lighting, operation, functionality and maintenance.

3. THAT either party be at liberty to apply.”

It would appear from the above consent order that the parties had settled the matter subject to the

conditions stated therein. As matters now stand this was not to be. This new suit followed after the plaintiff had reinstalled the signage. There arose a dispute relating to the commencement date and also the assertion by the plaintiff that, having incurred loss caused by the defendant when the signage was brought down, the cost thereof should be offset against future rentals thereby adding 21 months on the term of the licence.

The defendant has denied causing any loss to the plaintiff as a result of pulling down the signage. On the contrary the defendant states that it incurred loss by the removal of the said signage. Whereas the plaintiff has quantified its loss, the defendant has not. A mere denial therefore is not evidence.

It would appear according to the plaintiff, a new commencement date had been introduced. This is notwithstanding the letter dated 26th August, 2013 addressed to the plaintiff by the defendant's Ag. Managing Director whereby permission was granted to carry out the installation works upon some considerations set out therein.

I consider it necessary to set out the said letter in full as I consider it instructive. It reads as follows,

“

26th August, 2013

The Managing Director

Alliance Media Kenya

P. O. Box 25503- 00603

NAIROBI

Dear Sir,

RE: PROPOSED PLACING OF AN ADVERTISING SIGNAGE AT THE NECK OF TOWER BLOCK OF KENYA INTERNATIONAL CONFERENCE CENTRE

We are in receipt of a letter Ref. BD 46/0888AO/Vol. IV from the Chief Architect Ministry of Land, Housing and Urban development confirming the proposed signage, structure can be installed without affecting the structural integrity of the building.

You are thus granted permission to carry out the installation works with the following considerations:

- 1. All staff to work on site must be registered officially with the KICC.**
- 2. Safety of staff working on the project, client, employees and all assets must be insured.**

Kindly liaise with our Ag General Manager Operations on logistic of the same.

Yours faithfully,

FRED SIMIYU

AG MANAGING DIRECTOR”

That letter elicited a reply by the plaintiff dated 30th August, 2013 which indicated the lease would commence on 1st October, 2013 with expiry date set for 30th September, 2016. The defendant would

appear to be right in stating that there are several inconsistencies on the part of the plaintiff as to the commencement date and expiry date of the licence which is the subject matter of this case.

The letter cited above is clear in its tenor and context that the plaintiff was “**thus granted permission to carry out the installation works**”. The reference subject reads, “**PROPOSED PLACING OF AN ADVERTISING SIGNAGE**” It is clear that as at 26th August, 2013 the said signage was not in place, a delay that cannot be attributed to the plaintiff. I say so because the correspondence exchanged between the parties and with particular reference to the plaintiff’s letter addressed to the Managing Director of the defendant dated 5th January, 2016 being annexure JWM7 to the supporting affidavit, enumerates the reasons for the delay in mounting the signage.

On the issue of whether or not the licence could be renewed for a further period of three years the letter of offer dated 4th August, 2012 addressed to the plaintiff by the defendant provides in clause one “**The licence will be for a period of 3 years (May be renewed).**” Although this may not give any guarantee to the plaintiff it was impliedly subject to negotiation. It will not be farfetched therefore that the plaintiff entertained the belief that the defendant would accede to the renewal.

A further angle has been introduced by the defendant to the effect that concern has been raised by the public condemning the installation hence the defendant is not desirous of renewing the licence. Whereas the court recognizes public interest especially relating to national monuments, (which this premises is) it also has a duty to protect private interests. In any case as I have said elsewhere in this ruling at the expiry of the term of the licence the premises shall be restored to its original form.

Going by the material before me, I believe I will be right to uphold the submission that the commencement date was 2nd December, 2013 going by the consent order referred to above, considering the intervening factors that have been cited by the plaintiff and in particular the averment in paragraphs 14 and 15 of the supporting affidavit.

On that basis alone, the plaintiff has established a prima facie case with a probability of success. It has been submitted however that if the plaintiff suffered any damages as a result of the defendant’s actions, then an award of damages would be sufficient compensation. It will be noted that the plaintiff’s suit is not about damages and this is borne out in the pleadings and the prayers set out in the plaint dated 19th and filed on 22nd February 2016. Nowhere has the plaintiff prayed for damages for any breach attributed to the defendant.

I agree therefore with the submission that in the event the plaintiff is successful no amount of damages would be sufficient to compensate the plaintiff. There is no dispute that there is a 3rd party who is not a party to these proceedings, but who has entered into an agreement with the plaintiff. Although the terms of engagement between the plaintiff and the 3rd party are not part of this record, any adverse order against the plaintiff would definitely impact on that relationship.

The plaintiff is said to be an advertising company. Image and credibility must come into play. No amount of damages can redeem a name because a name of a company or a human being for that matter is priceless.

I must at this point cite the case of **Waithaka Vs Industrial and Commercial Development Corporation (2001) KLR 374.** Where Ringera J (as he then was) said as follows,

“As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, and interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy..... If the adversary

has been shown to be highhanded or oppressive in its dealings with the applicant this may move the court of equity to say: ‘money is not everything at all times and in all circumstances and don’t you think you can violate another citizen’s right only at the paying of damages.’ in the instant case, although I have found myself in doubt as to the existence of a prima facie case, I have said enough to show that the plaintiff has an arguable case and that the defendant’s conduct may be regarded as high handed and probably unfounded in law.”

In the instant case I have already found the plaintiff has established a prima facie case with a probability of success. I am reinforced by the **Waithaka Case** above to find damages would not be adequate compensation in the circumstances of this case.

I know the plaintiff has sought a mandatory injunction and that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases.

In this case however, the contract has timelines which on expiry the plaintiff has to restore the premises to the condition in which they were at commencement of the licence. The order that commends itself is that a mandatory injunction should issue in this case. I am fortified in making that conclusion by the fact that there is no allegation the plaintiff shall deface the premises. There is no allegation that the plaintiff has failed to meet its obligations to the defendant and more particularly the payment of rent.

The defendant on the other hand has displayed high handedness in dealing with the plaintiff by damaging the signage and switching off the power. These actions cannot be tolerated by the court of law. In the end the application must succeed. The plaintiff shall have orders as prayed in the Notice of Motion dated 19th February, 2016 with costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 6th Day of June, 2016.

A. MBOGHOLI MSAGHA

JUDGE